Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

No. 02-1689

IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

ROGER B. GREENBERG
Counsel of Record
GERARDO "JERRY" GARCIA
SCHWARTZ JUNELL GREENBERG
& OATHOUT L.L.P.
Two Houston Center
909 Fannin, Suite 2000
Houston, Texas 77010
(713) 752-0017

Attorneys for Respondents

185043

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Statement of the Case 1

Summary of the Argument 2

Argument 4

I. The Fifth Circuit Opinion Applied Correctly This Court's Precedent. 4

A. This Court's Opinion In *Caterpillar* Applies To Cases Filed Originally In Federal Court. 5

1. This Court Did Not Limit Its Holding To Removal Cases. 5

2. Cases Filed Originally In Federal Court Should Not Be Subject To Different Rules Regarding Subject Matter Jurisdiction. 7

B. *Caterpillar* Applies To Cases In Which A Party Unilaterally Cures The Lack Of Complete Diversity. 8

C. The Interpretation Of *Caterpillar* Suggested By Dataflux Creates The Danger Of Manipulation Of The Federal Courts. 10

Contents

	Page
D. *Caterpillar* Applies To Cases In Which The Jury Has Returned A Verdict, But No Judgment Has Been Entered.	11
E. *Caterpillar* Applies Without Regard To Whether The Nondiverse Party Is A Party To The Judgment.	12
F. The Fifth Circuit's Opinion Stated Clearly That It Viewed *Newman-Green* As Only Instructive.	13
II. The *Saadeh* Opinion Is Not Persuasive. ...	14
III. Policy Concerns Support The Fifth Circuit Opinion.	15
A. Judicial Economy Weighs In Favor of The Fifth Circuit Opinion.	15
B. The Fifth Circuit Opinion Is Sufficiently Limited.	17
C. The Fifth Circuit Opinion Prevents Inconsistent Fact findings.	18
Conclusion	19

TABLE OF CITED AUTHORITIES

	Page
CASES	
Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168 (5th Cir. 2002)	*passim*
Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996)	*passim*
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	17
Estate of Martineau v. Arco Chem. Co., 203 F.3d 904 (5th Cir. 2000)	7
In re AT&T Fiber Optic Cable Installation Litig., No. IP 99-9313-C H/K,2001 WL 1397295 (S.D. Ind. Nov. 5, 2001)	11
Knop v. McMahan, 872 F.2d 1132 (3d Cir. 1989)	5
Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989)	13, 14, 16
Saadeh v. Farouki, 107 F.3d 52 (D.C. Cir. 1997)	14, 15
Shamrock Oil Corp. v. Sheets, 313 U.S. 100 (1941)	8

Cited Authorities

	Page
Stafford v. Mobil Oil Corp., 945 F.2d 803 (5th Cir. 1991).	7, 10
Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921)	7, 10
STATUTES AND RULES	
28 U.S.C. § 1441(a)	8
28 U.S.C. § 1447(c)	7, 9
FED. R. CIV. P. 12(b)(1)	7, 10

STATEMENT OF THE CASE

The underlying facts and procedural history of this case have been discussed thoroughly in the pleadings filed with this Court and in the opinion from the Fifth Circuit ("the Fifth Circuit Opinion"). *See Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 169-70 (5th Cir. 2002). Respondents, Atlas Global Group, L.P., Oscar Robles-Canon, and Francisco Llamosa (collectively "Atlas"), will not, therefore, waste the Court's time by stating them yet again.

Atlas will take this opportunity, though, to address a disagreement it has with Petitioner's characterization of the holding in the Fifth Circuit Opinion. Dataflux made the following statement regarding the Fifth Circuit's holding: "The panel majority held that the trial court erred in dismissing Atlas' suit for lack of jurisdiction because: (1) the lack of diversity between Atlas and Dataflux at the time suit was filed was cured shortly before trial by Atlas' unilateral change in citizenship. . . ." (Petitioner's Brief, p. 5). However, the Fifth Circuit specifically rejected Dataflux's argument regarding any purported "unilateral change of citizenship" as a basis for its holding that jurisdiction was proper. *See Atlas Global Group*, 312 F.3d at 172-73. Further, the Fifth Circuit did not rely for its holding on whether the lack of diversity was cured "shortly" before trial. *See id.*

The Fifth Circuit's holding was, instead, as follows:

> In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the

court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their claims in state court, or likely in federal court, is not necessary under *Caterpillar*. In so concluding, we remain aware of the limited nature of the district court's jurisdiction and the Supreme Court's caveat against improper expansion of federal jurisdiction. However, this narrow exception applies only where (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured. If at any point prior to the verdict or ruling, the issue is raised, the court must apply the general rule and dismiss regardless of subsequent changes in citizenship.

Atlas Global Group, 312 F.3d at 174. This is the holding at issue here. For the reasons discussed below, Respondents request that this Court affirm this holding.

SUMMARY OF THE ARGUMENT

This Court should accept the very limited exception created by the Fifth Circuit to the time-of-filing principle.

In *Caterpillar* this Court recognized an exception to the time-of-filing principle, which was applied in the

circumstance that the jurisdictional defect, based on lack of diversity, was cured before the trial commenced, and before the issue was raised by either the parties or the court. The Fifth Circuit applied that exception correctly to the circumstances presented in this case.

Despite Petitioner's argument to the contrary, the Fifth Circuit concluded correctly that the exception recognized in *Caterpillar* is applicable to cases originally filed in federal court and to cases in which a party unilaterally cures the jurisdictional defect. In that regard, this Court did not place any such limitations on the exception. Further, simple fairness demands that the exception be applied uniformly.

In addition to this Court's precedent, policy concerns validate the Fifth Circuit's opinion. As this Court has noted previously, a strong policy of judicial economy weighs in favor of avoiding the waste of judicial resources by dismissing a case after substantial resources have been devoted to its litigation, especially when the complained-of jurisdictional defect was cured before a trial ever commenced. Likewise, the important policy of finality weighs in favor of the Fifth Circuit's holding. If cases such as the one at bar were permitted to be dismissed after findings had been made on the merits, the substantial and dangerous risk of inconsistent fact findings would be created.

ARGUMENT

I. The Fifth Circuit Opinion Applied Correctly This Court's Precedent.

The Fifth Circuit Opinion is merely a correct application of this Court's holding in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). *Caterpillar* was a products liability case brought in state court by a Kentucky resident against Caterpillar and another defendant. *Id.* at 64-65. Caterpillar was a Delaware corporation with its principal place of business in Illinois. *Id.* at 65. The other defendant was a Kentucky corporation with its principal place of business in Kentucky. *Id.* After suit was filed, the plaintiff entered into a settlement agreement with the nondiverse defendant. *Id.* After the settlement, but before the nondiverse defendant was dismissed from the suit, Caterpillar removed the case to federal court, asserting diversity jurisdiction. *Id.* The plaintiff filed a motion to remand, contending that complete diversity was lacking because an intervening plaintiff still had a subrogation claim against the nondiverse defendant. *Id.* at 65-66. The trial court denied the motion to remand. *Id.* at 66. Before the trial began, the subrogation plaintiff settled its claim against the nondiverse defendant, and the trial court dismissed that defendant. *Id.* The trial was completed and judgment was entered in Caterpillar's favor. *Id.* at 67. The Sixth Circuit reversed and vacated the judgment, holding that the case had been improperly removed. *Id.*

On appeal, this Court reversed the Sixth Circuit, and held that because jurisdiction had been cured before trial commenced, jurisdiction was proper and the district court's erroneous denial of the motion to remand was not a sufficient error to warrant vacating the judgment. *Id.* at 73. *Caterpillar* was not the first instance that such an exception to the

time-of-filing principle had been recognized. *See, e.g., Knop v. McMahan*, 872 F.2d 1132, 1139 n.16 (3d Cir. 1989) ("To permit a case in which there is complete diversity throughout trial to proceed to judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources. It would also encourage litigants to speculate on the jurisdiction issue by saving it for use in the event of a loss.").

As demonstrated below, the Fifth Circuit correctly applied *Caterpillar* to this case.

A. This Court's Opinion In *Caterpillar* Applies To Cases Filed Originally In Federal Court.

1. This Court Did Not Limit Its Holding To Removal Cases.

Dataflux argues that the application of *Caterpillar* should be limited to removal cases. (*See* Petitioner's Brief, pp. 20-26). This Court did not, however, limit its holding in *Caterpillar* to cases that are removed to federal court. *See Caterpillar*, 519 U.S. at 61-78. While it is true that *Caterpillar* did involve a case that was removed, the *Caterpillar* Court's analysis concerning diversity jurisdiction did not focus on removal. This is demonstrated by the method in which the *Caterpillar* Court concluded that jurisdiction existed before the Court ever addressed the issue of removal.

The *Caterpillar* Court began its analysis by noting that the underlying case had proceeded to trial, jury verdict, and judgment. *Id.* at 64-67. The *Caterpillar* Court noted further

that, on appeal, the Sixth Circuit had vacated the judgment for lack of subject matter jurisdiction because complete diversity did not exist when the case was removed. *Id.* at 67. Before the *Caterpillar* Court addressed issues regarding removal procedure, the Court analyzed whether the lack of complete diversity, at the time the case was removed, was a sufficient basis to have deprived the district court of subject matter jurisdiction. *Id.* at 73. The *Caterpillar* Court concluded the Sixth Circuit had erred. *Id.* This Court held that the trial court did have subject matter jurisdiction because "[t]he jurisdictional defect was cured, i.e., complete diversity was established before the trial commenced." *Id.* at 73.

Only after the *Caterpillar* Court concluded that subject matter jurisdiction existed, did it address the issue of removal. *See id.* at 73-78. In particular, the *Caterpillar* Court addressed whether the trial court's error in denying the plaintiff's proper motion to remand was a sufficient "statutory flaw" to warrant sending the case back to the district court for the entire litigation process to be done over. *See id.* Notably, the Court held that even that error was not sufficient to prevent the trial court from entering judgment. *Id.* at 64, 77.

The *Caterpillar* Court never stated any intent to have the application of its reasoning or holding limited to removal cases. *See Caterpillar*, 519 U.S. at 61-78. It is telling that Dataflux has not cited to any portion of the *Caterpillar* decision that supports its position that this Court intended its opinion to be limited to removal cases. As such, Petitioner's assertion that *Caterpillar* be limited to removal cases should be rejected.

2. Cases Filed Originally In Federal Court Should Not Be Subject To Different Rules Regarding Subject Matter Jurisdiction.

Dataflux argues that a case that is filed originally in federal court should be treated differently than one that is removed to federal court. (*See* Petitioner's Brief, pp. 20-26). Dataflux seeks to support this argument with its assertion that the judge and the parties will somehow behave differently in the context of a case removed to federal court than in the context of a case filed originally in federal court. Specifically, that a case will be scrutinized closer in the removal context. (*See* Petitioner's Brief, p. 23). However, in both an originally filed case and a removal case, the same opportunities and obligations to remedy a jurisdictional defect exist.

In the context of removal, it is the party removing the case who has the burden to establish diversity. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Estate of Martineau v. Arco Chem. Co.*, 203 F.3d 904, 910 (5th Cir. 2000). In the context of an original filing, it is the party filing the suit who bears the burden to establish diversity. *See Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991). Regardless of whether a case is removed to, or filed originally in, federal court, the party that seeks to avoid federal jurisdiction has the opportunity to raise the lack of diversity. *See* 28 U.S.C. § 1447(c) (permitting a party to file a motion for remand for lack of subject matter jurisdiction); FED. R. CIV. P. 12(b)(1) (permitting a party to move for dismissal for lack of subject matter jurisdiction). Further, the court can raise the lack of diversity at any time, regardless of whether a case is removed or filed originally in federal court. *See Stafford*, 945 F.2d at 804 (noting that the lack of subject matter jurisdiction can be, and should be, raised by

the court). Considering these well settled principles, it seems illogical that a removal case is subject to greater scrutiny, or that courts should apply a different jurisdictional standard to cases filed originally in federal court.

Another important issue to consider in reference to Petitioner's argument is the fairness of Dataflux's proposition. In the context of removal, the party that is asserting federal jurisdiction is the defendant. *See* 28 U.S.C. § 1441(a); *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 104-05 (1941). By contrast, the plaintiff is the party that asserts federal jurisdiction in a case originally filed in federal court. As such, the interpretation of *Caterpillar* suggested by Dataflux would create a different rule for defendants than for plaintiffs. This is neither a fair application of the law nor is this the application called for under *Caterpillar*.

Ultimately then, as demonstrated above, the mere fact that *Caterpillar* was a removal case is a distinction without a difference. Atlas requests therefore that this Court reject Dataflux's incorrect and unfair suggested interpretation of *Caterpillar*.

B. *Caterpillar* Applies To Cases In Which A Party Unilaterally Cures The Lack Of Complete Diversity.

Dataflux argues that if jurisdiction is cured by a party's own conduct, that party should be excluded from the benefits offered by *Caterpillar*. This interpretation of *Caterpillar* is flawed. A review of *Caterpillar* reveals that this Court did not limit its holding to cases in which the lack of diversity is cured by a party's own conduct. *See Caterpillar*, 519 U.S. at 61-78. Although *Caterpillar* did involve a nondiverse party

that was eliminated through dismissal, the Court's analysis concerning diversity jurisdiction did not focus on how the nondiverse party was eliminated. *See id.* Again, as discussed above, this is demonstrated by the method in which the Court performed its analysis. Namely, the *Caterpillar* Court determined that diversity jurisdiction existed because the lack of diversity was cured "before trial commenced." *Id.* at 73. In reaching this conclusion, the *Caterpillar* Court did not rely, in any way, on how the lack of diversity was cured. *See id.* at 61-78.

Another relevant issue that Dataflux overlooks is that in *Caterpillar*, the lack of diversity was cured, in part, by a unilateral act performed by the parties. In *Caterpillar*, jurisdiction was cured when all claims involving the nondiverse defendant were settled and the court then dismissed the nondiverse defendant from the suit. *See Caterpillar*, 519 U.S. at 64. The district court's conduct in dismissing the nondiverse defendant occurred only after the parties reached their settlement, and the district court's dismissal merely carried out the parties' agreement.[1] Thus, the event that cured the lack of diversity was not performed solely by the court.

Finally, regardless of whether the lack of complete diversity is cured by a unilateral act of a party seeking to assert jurisdiction, the same opportunities and obligations to remedy a defect in jurisdiction discussed above exist before the nondiverse party is eliminated. *See* 28 U.S C. § 1447(c);

1. While it is not clear what part Caterpillar, which was the removing party, played in the settlement, the lack of involvement by the district court in the conduct that led to the curing of the jurisdictional defect is particularly relevant given Petitioner's argument.

FED. R. CIV. P. 12(b)(1); *Wilson*, 257 U.S. at 97; *Estate of Martineau*, 203 F.3d at 910; *Stafford*, 945 F.2d at 804. Namely, a party has several procedural mechanisms available to bring the lack of diversity to the court's attention and the court itself can raise the issue at any time. *See id.*

Atlas requests, therefore, that this Court reject Dataflux's proposed interpretation of *Caterpillar*, which would exclude from its application those parties whose conduct assisted in curing the jurisdictional defect.

C. The Interpretation Of *Caterpillar* Suggested By Dataflux Creates The Danger Of Manipulation Of The Federal Courts.

Dataflux contends, incorrectly, that if parties are permitted to unilaterally correct the lack of complete diversity, such parties can manipulate federal jurisdiction.[2] This erroneous argument has been discounted above. Nevertheless, Petitioner's contention regarding possible manipulation should not be considered without a discussion of the danger of manipulation created if Petitioner's interpretation of *Caterpillar* were to be accepted. In that regard, an unscrupulous defendant could realize that diversity was not complete when the plaintiff filed its complaint. The defendant could then wait for the jury's verdict. If the defendant did not like the verdict, the defendant could merely object based on the lack of jurisdiction, and thereby unwind the entire case, and receive "a second bite at the apple."[3]

2. Dataflux acknowledges that "Atlas was not attempting to manipulate jurisdiction." (Petitioner's Brief, p. 24).

3. Atlas seeks in no way to suggest that Dataflux or its counsel engaged in such inappropriate behavior. Atlas points out the possibility only to demonstrate that an unscrupulous party or counsel could engage in such behavior.

Likewise, the same example would apply in the context of removal if a plaintiff noticed the lack of complete diversity and waited to raise the issue until after the verdict. This clear danger for manipulation creates a further basis for the rejection of Petitioner's argument.

D. *Caterpillar* Applies To Cases In Which The Jury Has Returned A Verdict, But No Judgment Has Been Entered.

Dataflux argued below that *Caterpillar* does not apply to cases in which a verdict has been returned, but judgment has not been rendered. In an abundance of caution, Atlas will address that argument. This Court did not limit its holding in *Caterpillar* to cases in which judgment was entered. *See Caterpillar*, 519 U.S. at 61-78; *see also In re AT&T Fiber Optic Cable Installation Litig.*, No. IP 99-9313-C H/K, 2001 WL 1397295, at #5-7 (S.D. Ind. Nov. 5, 2001) (concluding that *Caterpillar* does not make judgment a prerequisite). In fact, the *Caterpillar* Court stated clearly that the basis for its holding that the trial court had subject matter jurisdiction to enter the judgment was that "[t]he jurisdictional defect was cured, i.e., complete diversity was established *before the trial commenced*." *Caterpillar*, 579 U.S. at 73 (emphasis added).

It is important to note also that if the entry of judgment were required, the same danger of manipulation discussed above would exist. Specifically, either an unscrupulous defendant or plaintiff could wait for the jury's verdict to determine whether it wanted to raise the issue of the lack of jurisdiction. Taking this contention to the absurd, if a trial court were to apply Dataflux's proposed interpretation of *Caterpillar*, that court would be compelled to dismiss a fully litigated case in the following circumstance: a jury verdict

has been returned, the judge is in the process of entering the judgment, and a split second before the judge does so, the defendant objects to the lack of complete diversity at the time the case was filed. It is unlikely this Court intended such a result, especially in light of its statement that jurisdiction existed in *Caterpillar* because diversity was cured "before trial commenced." Atlas requests, therefore, that this Court reject any such argument.

E. *Caterpillar* Applies Without Regard To Whether The Nondiverse Party Is A Party To The Judgment.

Petitioner seeks to avoid the application of *Caterpillar* by arguing that "the parties to the judgment in *Caterpillar* started out diverse and stayed diverse throughout the litigation." (Petitioner's Brief, p. 21). This argument, like Dataflux's other attempts to distinguish *Caterpillar*, fails. First and foremost, this Court did not make any such limitation of its holding in *Caterpillar*. *See Caterpillar*, 519 U.S. at 64, 73. Further, Dataflux glosses over the important point that the lack of diversity existed at the time *Caterpillar* was removed to federal court. (*See* Petitioner's Brief, p. 21) ("The only jurisdictional defect at the time of removal was the initial presence of another defendant who was not diverse from the plaintiff. . . ."). That point is, of course, very significant given the issues presented here. Accordingly, whether the previously nondiverse party is a party to the judgment is of no importance.

F. The Fifth Circuit's Opinion Stated Clearly That It Viewed *Newman-Green* As Only Instructive.

Dataflux argues that the Fifth Circuit erred in relying on *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989) because "*Newman-Green* addressed the narrow question of whether a court of appeals may dismiss a non-diverse dispensable party to cure a jurisdictional defect, or whether the appellate court must remand the case to the district court to determine if dismissal is proper." (Petitioner's Brief, p. 26). Dataflux is mistaken in its reading of the Fifth Circuit Opinion. The Fifth Circuit stated clearly that *Newman-Green* is distinguishable from the present case, and that it saw *Newman-Green* as only instructive in addressing the current case. In particular, the Fifth Circuit stated the following:

> Although *Newman-Green* is distinguishable because Rule 21 is not at issue in the case before us, we find its underlying policy theme instructive. The Court in *Newman-Green* stressed that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." It is this rationale that persuaded the Court in *Newman-Green* and again in *Caterpillar*.

Atlas Global Group, 312 F.3d at 171.

It bears noting that in *Caterpillar*, this Court likewise noted that while *Newman-Green* was distinguishable from the facts in *Caterpillar*, the policy concerns detailed in *Newman-Green* were "instructive." *See Caterpillar*, 519 U.S. at 75-76. In light of Dataflux's incorrect reading of the Fifth

Circuit Opinion, Atlas urges the Court to reject Dataflux's assertion that the Fifth Circuit erred by considering *Newman-Green* in its analysis of this case.

II. The *Saadeh* Opinion Is Not Persuasive.

Dataflux argues that the Fifth Circuit Opinion conflicts with the D.C. Circuit's decision in *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). In *Saadeh*, complete diversity did not exist when the plaintiff filed his complaint, but was later created. *Id.* at 53-54. Before trial, the defendant raised the previous lack of diversity in a motion to dismiss. *Id.* at 54. The trial court denied the motion. *Id.* at 54. On appeal, the D.C. Circuit considered this Court's holding in *Caterpillar*. *Id.* at 57. The D.C. Circuit refused to apply *Caterpillar*. *Id.* at 57. In doing so, the D.C. Circuit did not, however, provide analysis to support its rejection of *Caterpillar*. Specifically, the *Saadeh* Court stated the following:

> In *Caterpillar*, a removal case involving non-diverse parties, the district court denied a timely motion to remand and entered judgment following a jury trial. The Supreme Court, noting that as the result of a settlement resulting in dismissal of the non-diverse defendant, allowed the judgment to stand on the ground that considerations of finality, efficiency, and economy were paramount. . . . Although we are mindful of the considerations of finality, efficiency and economy that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from

> the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.

Id. at 57 (citations omitted).

The Fifth Circuit considered *Saadeh*, but rejected it "[b]ecause *Saadeh* does not provide any analytical justification for its conclusions that removal cases deserve differential treatment. . . ." *Atlas Global Group*, 312 F.3d at 173. A review of *Saadeh* reveals that, as noted in the Fifth Circuit Opinion, the *Saadeh* Court did not set out analysis to support its conclusions. Specifically, the *Saadeh* Court does not explain why it believed this Court intended *Caterpillar* to be limited to removal cases. *See Saadeh*, 107 F.3d at 57. Further, the *Saadeh* Court did not explain why a removal case should receive different treatment. *See id.* In light of the lack of analysis in *Saadeh*, the opinion does not provide a basis to overcome clear Supreme Court precedent. Atlas urges this Court, therefore, to reject *Saadeh*.

III. Policy Concerns Support The Fifth Circuit Opinion.

A. Judicial Economy Weighs In Favor Of The Fifth Circuit Opinion.

Dataflux contends that judicial economy does not support the Fifth Circuit Opinion. (Petitioner's Brief, pp. 31-35). Dataflux argues that if the Fifth Circuit Opinion is permitted to stand, it will increase consumption of judicial resources over time as litigants "test the limits" of the Fifth Circuit Opinion. Dataflux is mistaken.

The Fifth Circuit Opinion stated the following about judicial economy:

> In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their claims in state court, or likely in federal court, is not necessary under *Caterpillar*.

Atlas Global Group, 312 F.3d at 174.[4]

In reaching its conclusion, the Fifth Circuit Opinion noted that *Newman-Green* was instructive on the issue of judicial economy. The Fifth Circuit Opinion pointed specifically to the portion of *Newman-Green* that "stressed that 'requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.'" *Atlas Global Group*, 312 F.3d at 171 (quoting *Newman-Green*, 490 U.S. at 836). The Fifth Circuit considered also the following statements by the *Caterpillar*

4. In addition to the jury verdict against Dataflux, the jury also found against Dataflux on its third-party claims against two individual plaintiffs. Under Dataflux's interpretation of *Caterpillar*, the verdict on the third-party claims would likewise be erased, thereby requiring the parties to retry those issues. Clearly, this would also cut against the policy of judicial economy.

Court about judicial economy: "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Atlas Global Group*, 312 F.3d at 172 (quoting *Caterpillar*, 519 U.S. at 75, 77).

Despite the Fifth Circuit Opinion's clear reliance on Supreme Court statements regarding judicial economy, Dataflux seeks to challenge these principals with its apparent contention that courts should not seek to apply exceptions to general rules because future litigants may seek to broaden the application of the exceptions. Dataflux does not, however, cite any authority for such a proposition. Considering the lack of authority for such a proposition, and the general absurdity of the idea that a court should refrain from applying a necessary exception merely because future litigants may ask the court to extend the application, Atlas urges the Court to reject Dataflux's argument and to conclude instead that judicial economy weighs in favor of the Fifth Circuit Opinion.

B. The Fifth Circuit Opinion Is Sufficiently Limited.

Petitioner contends that the exception created by the Fifth Circuit Opinion is too broad. (Petitioner's Brief, pp. 32-39). To the contrary, the Fifth Circuit limited the bounds of its holding, which thereby makes the limits of the exception clear. In fact, as if anticipating the argument, the Fifth Circuit held as follows:

> [W]e remain aware of the limited nature of the district court's jurisdiction and the Supreme Court's caveat against improper expansion of federal jurisdiction. However, this narrow

> exception applies ***only*** where (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured. If at any point prior to the verdict or ruling, the issue is ***raised***, the court must apply the general rule and dismiss regardless of subsequent changes in citizenship.

Atlas Global Group, 312 F.3d at 174 (emphasis added).

Based on this holding, the test of whether a jurisdictional defect has been timely cured is clear. Jurisdiction will be proper if the defect is cured (1) before it is raised by the court or the parties; and (2) before a jury verdict is rendered or a dispositive ruling is made. These are very specific events. In addition, it bears noting that the Fifth Circuit has circumscribed the exception to an even greater degree than the limit set by this Court in *Caterpillar*. In *Caterpillar*, this Court found the relevant time to be before the trial commenced, whereas the Fifth Circuit made the further limitation of when the jury verdict has been rendered. Respondents request, therefore, that this Court conclude that the Fifth Circuit Opinion is sufficiently restrictive.

C. The Fifth Circuit Opinion Prevents Inconsistent Fact findings.

The policy concern of preventing inconsistent factfindings also weighs in favor of the Fifth Circuit Opinion. In particular, if the law were not as set out in *Caterpillar* and the Fifth Circuit Opinion, the danger of inconsistent findings

would be created. Namely, as in this case, a party could receive a jury verdict, have its case dismissed, go through the entire litigation process again, and have a jury reach a different verdict. The Fifth Circuit Opinion, as written, prevents such an inconsistent result. Atlas asks the Court to maintain that protection by affirming the Fifth Circuit Opinion.

CONCLUSION

For the reasons stated above, it is evident that the Fifth Circuit Opinion is correct, and supported by clear Supreme Court precedent and policy principles. Accordingly, Respondents ask that this Court affirm the judgment of the court of appeals. Atlas requests further all other relief to which it may be entitled.

Respectfully submitted,

ROGER B. GREENBERG
Counsel of Record
GERARDO "JERRY" GARCIA
SCHWARTZ JUNELL GREENBERG
& OATHOUT L.L.P.
Two Houston Center
909 Fannin, Suite 2000
Houston, Texas 77010
(713) 752-0017

Attorneys for Respondents